Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: O, FF
Tenant: MNDC, FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution with both parties seeking monetary orders.

The hearing was conducted via teleconference and was attended by the landlord and the male tenant.

At the outset of the hearing I confirmed that both parties had received each other's respective hearing documents including Applications for Dispute Resolution; notice of hearing documents; and evidence. I also confirmed both parties were prepared to respond to each other's Application.

However during the hearing the tenant did indicate that he had not submitted evidence to respond to the landlord's Application because she had waited until the deadline to apply to have her Application heard as a cross Application to the tenants' own Application.

Residential Tenancy Branch Rule of Procedure 2.11 states to counter an existing Application for Dispute Resolution or in response to a related Application for Dispute Resolution, respondents may make a cross-application by filing their own Application for Dispute Resolution.

The issues identified in the cross-application must be related to the issues identified in the application being countered or responded to.

A party submitting a cross-application is considered the cross-applicant and must apply as soon as possible and so that the respondent to the cross-application receives the documents set out in Rule 3.1 [*Documents that must be served with the hearing package*] not less than 14 days before the hearing and so that the service provisions in Rule 3.15 [*Respondent's evidence provided in single package*] can be met.

As the tenant did not raise any issues at the outset of the hearing regarding the timing of the landlord's Application and both parties confirmed that they were ready to proceed at the time they called into the hearing, and the tenant did not attempt to submit evidence to the landlord or the Residential Tenancy Branch, I have no evidence that the

landlord has failed to meet the requirements set out in Rule of Procedure 2.11. As such, I am satisfied the tenant had an opportunity to submit any evidence in response to the landlord's claim within the times allowed under the Rules of Procedure.

At the outset of the hearing I clarified that the landlord's Application did not indicate that she was seeking a monetary order or what amount she was seeking. However, I also noted that she had written in the details of dispute that she was seeking liquidated damages and that the amount was consistent with the specific clause in the tenancy agreement.

While the parties have provided a substantial volume of testimony and evidence in regard to many issues during the tenancy, I have recorded in this decision only that material that I have found germane and relevant to the respective claims.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to a monetary order for liquidated damages and to recover the filing fee from the tenants for the cost of the Application for Dispute Resolution, pursuant to Sections 67, and 72 of the *Residential Tenancy Act (Act).*

It must also be decided if the tenants are entitled to a monetary order for compensation for damage or losses suffered as a result of the tenancy and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 6, 28, 32, 33, 67, and 72 of the *Act.*

Background and Evidence

The landlord submitted a copy of a tenancy agreement signed by the parties on September 9, 2015 for a 1 year fixed term tenancy beginning on October 1, 2015 for a monthly rent of $2,750.00 due on the 1st of each month with a security deposit of $2,750.00 paid. The tenancy ended when the tenants vacated the rental unit by February 1, 2016. The tenant confirmed the landlord has returned the security deposit.

The tenancy agreement includes clause 5 which states:

> "Liquidated Damages. If the tenant breaches a material term of this Agreement that causes the landlord to end the tenancy before the end of the fixed term, or if the tenant provides the landlord with notice, whether written, or, or by conduct, of an intention to breach this Agreement and end the tenancy by vacating, and does vacate before the end of any fixed term the tenant will pay to the landlord the sum of $200 as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not preclude the landlord from claiming future rental revenue losses that will remain unliquidated." [Reproduced as written]

The landlord seeks liquidated damages in the amount of $200.00 because the tenants moved out of the rental unit earlier than the end of the fixed term.

The tenant submits that for a number of reasons the landlord agreed to allow the tenants out of their fixed term and convert to a month to month tenancy, so that if they found new accommodation they could give the landlord a one month notice.

In their documentary evidence the tenants submitted a copy of an email dated January 18, 2016 addressed to the landlord making the above request. The landlord confirmed receiving this email and she agreed to the tenants' request. The parties also confirmed that on January 24, 2016 the tenants provided the landlord with an email giving notice of their intention to end the tenancy and vacate by March 1, 2016.

The tenant, however, stated that the landlord was able to secure new occupants for the rental unit effective February 1, 2016. The landlord did not dispute this submission.

The tenant submits that when they originally viewed the property at the beginning of September 2015 the landlord assured them that the bachelor unit attached to the rental unit would be occupied by a single person. The tenant also submits that when they signed the tenancy agreement they understood that the utilities for each unit would be separate.

He testified that 3 days before the start of the tenancy the landlord informed them that she could not split the hydro into separate meters and the tenants would be responsible for all of the hydro costs and that the bachelor unit was going to be occupied by a couple with a dog. He further stated that with no other option they negotiated a reduction of rent in the amount of $75.00 per month to cover hydro used by the bachelor unit. The tenant stated he accepted this amount based on the previous year's usage by a single occupant. The tenant submits that there was no discussion about splitting the water and waste collection costs.

The tenant submits that after the charges for hydro were billed they felt that the $75.00 rent reduction did not sufficiently compensate the tenants for the usage of the occupants in the bachelor unit. The tenants seek compensation in the amount of $305.98 based on actual usage. The tenants also seek compensation equivalent to ½ of the amount paid by them for water and waste collection utilities during their tenancy in the amount of $192.73.

The landlord testified that the rent reduction of $75.00 per month represents $50.00 for the monthly hydro charge and $25.00 for the water and waste collection monthly charges.

The landlord stated that the $50.00 per month for hydro was based on an equalized payment plan that levelled out the payment of hydro charges over the course of 1 year and a 2/3 vs 1/3 split between the two units. The landlord submitted the tenants only

resided in the property during the heavy usage winter months and as such were billed higher amounts for the actual usage.

The landlord also submits that the $25.00 per month amount for water and waste collection is based on a $50.00 per month charged by the local municipal authourity. The landlord confirmed that no additional terms were added to the tenancy agreement or that any agreement on these items was put to writing.

The tenants also seek compensation in the amount of $1,200.00 for lost income for three specific days where the male tenant missed work because of emergency problems on the property, specifically November 11; November 17; and December 14, 2016.

The tenant submits that on each of these occasions the property had a water or sewage problem – two were due to a perimeter drain problem and the third was related to a problem with the property's waste water system. The landlord did not dispute any of these events.

The tenant testified that due to reception problems their cellphones did not work at the rental unit and they did not have a landline. As a result, the tenant submits that when he reported these problems with the property he did so by email. He acknowledged that the landlord sent someone to deal with the matters and they arrived within 3 or 4 hours of him reporting the problems.

He stated that on November 11, 2015 he was not sure if the rain was going to stop so he remained home from work to monitor the encroaching water and clean the gutters. The tenant stated that as it turned out it did not rain again that day.

On November 17, 2015, the tenant submits that the water was getting seriously close to infiltrating the house and he was bailing water for the 3 to 4 hours they had to wait for the landlord's agent to arrive.

The tenant also submits that by the time of the December 14, 2015 sewage system problem he had lost all confidence in the abilities of the people that the landlord was sending so he had to stay to oversee the repairs.

In support of his claim for lost income the tenant has submitted a copy of an unsigned letter from the male tenant's former employer stating that his income and benefits total $400.00 per workday; that the male tenant missed 3 days of work due to flooding and ongoing rental property related issues; and that the employer is convinced the tenant's concerns for safety related to sewer gases and electrical systems is legitimate.

The tenant testified that there had been previous electrical problems and that when the landlord's handyman tried to replace a fan and tried it out he commented on how quiet the fan was. The tenant stated that it was quiet because he had failed to connect it

properly. The landlord testified that she had the electrical systems checked by two independent electricians and there were no electrical problems on the property.

The landlord submits that the she never asked the tenant to stay home from work or to assist in any of the maintenance activities. She stated she makes this a practice, in part, because of worker's compensation issues and potential liability. The landlord submits she is not obligated to reimburse any lost income.

The landlord provided in her written submissions that she spoke with the tenant's former employer and he indicated that it was the tenant who had written the letter and that the employer had declined to sign it. Her submission goes to say that she was informed that the male tenant worked on commission only with no specific salary.

The tenant testified that his former employer did not sign the letter because he was on vacation and not available at the time he needed to serve the letter as evidence for his Application within the 3 days required after submitting his Application for Dispute Resolution

I note: "Residential Tenancy Branch Rule of Procedure 3.1 requires the applicant to serve the respondent with their evidence within three days, if available, of their Application being accepted. For any evidence not available at the time the applicant filed their Application it must be served on the respondent as soon as possible or at least no later than 14 days prior to the hearing.

Rule of Procedure 3.11 states that evidence must be served and submitted as soon as reasonably possible. If an Arbitrator determines that a party unreasonably delayed the service of evidence, the Arbitrator may refuse to consider the evidence." As such, I find there was no reason the tenant could not have waited to have his employer sign it between the time he applied and this hearing (at least 5 months).

Analysis

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act,* regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

Section 44(1) of the *Act* states a tenancy ends only if one or more of the following applies:

a) The tenant or landlord gives a notice to end the tenancy in accordance with one of the following:

i. Section 45 (tenant's notice);
ii. Section 46 (landlord's notice: non-payment of rent);
iii. Section 47 (landlord's notice: cause);
iv. Section 48 (landlord's notice: end of employment);
v. Section 49 (landlord's notice: landlord's use of property);
vi. Section 49.1 (landlord's notice: tenant ceases to qualify;
vii. Section 50 (tenant may end tenancy early);

b) The tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;
c) The landlord and tenant agree in writing to end the tenancy;
d) The tenant vacates or abandons the rental unit;
e) The tenancy agreement is frustrated; or
f) The director orders the tenancy is ended.

Section 6(3) of the *Act* stipulates that a term in a tenancy agreement is not enforceable if the term is inconsistent with the *Act* or regulations; the term is unconscionable; or the term is not expressed in a manner that clearly communicates the rights and obligations under it. Section 3 of the Residential Tenancy Regulation states that a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party.

In the case before me, I accept that the tenancy agreement signed by the parties confirmed a 1 year fixed term tenancy ending on September 30, 2016 and that should the tenants vacate the unit prior to the end of the fixed term the tenants would be required to pay the landlord $200.00 as liquidated damages representing the costs required to re-rent the unit prior to the end of the fixed term.

However, I find that when the landlord, by her own testimony, agreed to allow the tenancy to be converted to a month to month tenancy the tenants were at liberty to end the tenancy at any time prior to September 30, 2016 with one month's written notice and without obligation to pay any costs to re-rent the unit prior to that date. As a result, I find the liquidated damages clause is rendered no longer relevant to the ending of the tenancy or enforceable. Therefore, I find the landlord has failed to provide sufficient evidence to establish entitlement to liquidated damages.

In relation to the tenants' claim for compensation for hydro and water/waste collection utility charges I am satisfied that the tenancy agreement does not include the landlord providing either of these utilities. However, I also note that the parties have not entered into any written agreement as to how the splitting and/or compensation for these utilities were to be determined.

I accept that the parties agreed to a $75.00 deduction for "utilities". As to what the parties meant as a definition of utilities is disputed by both parties. When one party to a dispute provides testimony regarding circumstances related to a tenancy and the other party provides an equally plausible account of those circumstances, the party making the claim has the burden of providing additional evidence to support their position.

In this case, the burden rests with the tenants to provide additional evidence to corroborate their claim that the $75.00 rent reduction did not include recognition of all shared utilities for the rental unit. As neither party has provided any documentation to provide evidence of what was agreed upon, I find the tenant has failed to establish that the rent reduction did not include compensation for water and waste collection utilities.

Further, in relation to the tenants' claims for increased compensation for hydro, I am not persuaded that the agreement made by the parties for a rent reduction as compensation for utility costs to be split is an unconscionable term. There is no evidence before me to establish the agreement is oppressive or grossly unfair.

I am persuaded, however, by the landlord's submission that the rate for hydro compensation is based on an equalized payment structure determined by previous usage for the same length of time of the expected fixed term of the tenancy. I find this to be a reasonable calculation.

If the tenants were not paying their utilities through an equalized plan; only lived in the rental unit during the highest usage period of the year and then decided to move out of the rental unit before the end of the fixed term and before realizing any lower hydro bills, I find the loss results the tenants' own actions.

Based on the above, I find the tenants have failed to provide sufficient evidence to establish any entitlement to compensation for either hydro or water and waste collection utility costs.

Section 33(1) of the *Act* defines "emergency repairs" as repairs that are urgent, necessary for the health or safety of anyone or for the preservation or use of residential property, and made for the purpose of repairing:

- Major leaks in pipes or the roof,
- Damaged or blocked water or sewer pipes or plumbing fixtures,
- The primary heating system,
- Damaged or defective locks that give access to a rental unit, or
- The electrical systems.

Section 33(3) states a tenant may have emergency repairs made only when all of the following conditions are met:

- Emergency repairs are needed;
- The tenant has made at least 2 attempts to telephone, at the number provided, the person identified by the landlord as the person to contact for emergency repairs; and
- Following those attempts, the tenant has given the landlord reasonable time to make the repairs.

Section 33(4) states a landlord may take over completion of an emergency repair at any time. Section 33(5) stipulates that a landlord must reimburse a tenant for amounts paid for emergency repairs if the tenant claims reimbursement for those amounts from the landlord, and gives the landlord a written account of the emergency repairs accompanied by a receipt for each amount claimed.

Based on the testimony and evidence of both parties I accept that on the three dates provided conditions existed that would constitute a need for emergency repairs to be made. I am satisfied that if a tenant's costs for emergency repairs are reimbursable from the landlord they may include a claim for lost income.

However, in the case before me, from the tenant's own testimony, they did not attempt to phone the landlord, but rather emailed her. As such, I find the tenants' had no authourity under the *Act* to engage in any emergency repair activity that would bind the landlord to compensate the tenant for any costs or lost income.

Furthermore, I find that there is no evidence before me that the landlord failed to take steps within a reasonable time after receiving email notification from the tenants that there was an emergency situation and make any required emergency repairs. I also find that, on a balance of probabilities, if the tenants had a land line or left the property to find an area where their cellphones had reception they could have informed the landlord sooner and she may have been able to respond even sooner.

For these reasons, I find the tenants, while they may have sustained a loss of income, have failed to provide any evidence that the landlord has breached the *Act*, regulation or tenancy agreement as it relates to these emergency repair situations.

Conclusion

Based on the above I dismiss the landlord's Application for Dispute Resolution in its entirety and without leave to reapply.

Also based on the above, I dismiss the tenants' Application for Dispute Resolution in its entirety and without leave to reapply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: February 03, 2017

Residential Tenancy Branch